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MEMORANDUM OPINION

Court of Appeal, Second District, Division 1, California.

NADARAJAN M., Plaintiff and Appellant,

v.

SANDRA W., Defendant and Respondent.

No. B155305.

(Super. Ct. No. BH 001509).

Nov. 20, 2002.

South African ex-husband petitioned for return of his minor child to South Africa under Hague Convention on Civil Aspects of International Child Abduction, as implemented by International Child Abduction Remedies Act. The Superior Court, Los Angeles County, No. BH 001509, [Aviva K. Bobb](#), J., denied petition, and ex-husband appealed. The Court of Appeal, [Ortega](#), J., held that, assuming guardianship rights are equivalent of custodial rights for purpose of Hague Convention, substantial evidence supported trial court's finding that ex-husband had no guardianship or custodial rights when child was removed to United States by ex-wife, and thus, removal was not wrongful.

Affirmed.

West Headnotes

[\[1\]](#) Child Custody 76D 809

[76D](#) Child Custody

[76DXI](#) International Issues

[76Dk809](#) k. Wrongful Retention or Removal.

Most Cited Cases

Assuming guardianship rights are equivalent of custodial rights, for purpose of Hague Convention on Civil Aspects of International Child Abduction as implemented by International Child Abduction Re-

medies Act, substantial evidence supported trial court's finding that South African ex-husband had no guardianship or custodial rights when child was removed to United States by ex-wife, and thus, removal was not wrongful; South African Children's Court named ex-wife as child's sole custodial parent and sole guardian and South African authorities twice rejected ex-husband's efforts to have ex-wife prosecuted for removing child in alleged violation of his access and guardian rights. International Child Abduction Remedies Act, §§ 4, [42 U.S.C.A. §§ 11603](#).

[\[2\]](#) Child Custody 76D 828

[76D](#) Child Custody

[76DXI](#) International Issues

[76Dk828](#) k. Findings. [Most Cited Cases](#)

Trial court was not required to issue statement of decision when it determined that child's removal from South Africa by ex-wife did not violate Hague Convention on Civil Aspects of International Child Abduction, as implemented by International Child Abduction Remedies Act; court did not change or modify existing custody order. International Child Abduction Remedies Act, §§ 4, [42 U.S.C.A. §§ 11603](#).

APPEAL from an order of the Superior Court of Los Angeles County. [Aviva K. Bobb](#), Judge. Affirmed. Law Offices of Leslie M. Jordon and [Leslie M. Jordon](#) for Plaintiff and Appellant.

[William M. Hilton](#) for Defendant and Respondent.

[Bill Lockyer](#), Attorney General, [Manuel M. Medeiros](#), State Solicitor General, Robert R. Anderson, Chief Assistant Attorney General, [Pamela C. Hamanaka](#), Assistant Attorney General, Linda C. Johnson and [Elaine F. Tumonis](#), Deputy Attorneys General, as Amicus Curiae for California Attorney General.

[ORTEGA](#), J.

*1 Appellant, a South African, petitioned for the return of his minor child to South Africa under the Hague Convention on the Civil Aspects of International Child Abduction (October 25, 1980, [51 Fed.Reg. 10,494, 10,498 \(1986\)](#), hereinafter "the Convention"

or “the Hague Convention,” implemented by the International Child Abduction Remedies Act, [42 U.S.C. § 11601 et seq.](#)) The superior court denied the petition after finding the child's mother, to whom the South African courts had granted sole custody of the child, did not violate appellant's custody rights by removing the child to the United States. We affirm.

BACKGROUND

Mother Sandra W. and Father Nadarajan M. were married in South Africa in 1992. Their son Tyron M. was born in South Africa in 1994. The couple obtained a divorce in South Africa in 1996, when Tyron was a year and a half. The divorce order, issued by the Supreme Court of South Africa, Durban [FNI](#) and Coast Local Division, awarded Mother sole legal and physical custody of Tyron. The divorce order granted Father visitation on alternate weekends.

[FNI](#). The record contains references throughout to both “Durban” and “Durbin.” We similarly use both spellings in this opinion as reflected in the record.

During the divorce proceedings, the South African Supreme Court issued an interlocutory “Interdict” or restraining order against Father. The restraining order prohibited Father from removing Tyron from Mother's custody, “save for the purposes of exercising his rights of access to the said child,” from “assaulting, interfering with, threatening, or harassing” Mother and Tyron, and from communicating with Mother except in writing. In her declaration filed in this proceeding, Mother explained the restraining order was issued after Father had held a gun to Tyron's head in order to prevent Mother from leaving with Tyron. Mother attested that before their separation, Father was unemployed, “consumed excessive quantities of alcohol and was physically and verbally abusive to me and the child.” The South African Supreme Court “reaffirmed” or reissued the restraining order upon entering the final divorce decree awarding sole custody to Mother on July 5, 1996.

According to Mother's declaration, Father continued to harass and threaten her after the divorce: “His harassment and constant telephone threats at work finally caused me to give notice at work. The problem of [Father's] harassment was also compounded by the fact that both his brother and sister are police offic-

ers, stationed at the Verul[a]m Police Station ... making it exceedingly difficult to obtain law enforcement assistance to enforce the existing Interdict against violence and harassment.”

Mother further stated that in July or early August 1996, Father failed to return Tyron to her after a weekend visit. The Verulam police, according to Mother, were uncooperative in securing Tyron's return. Mother sought assistance from her local police in Sydeham, who helped secure Tyron's return to Mother's custody.

In September 1996, according to Mother, Father again refused to return Tyron after a visit. This time, however, Father took Tyron to Johannesburg, and threatened that Mother would not see Tyron again unless she joined them there. After Mother arrived in Johannesburg, Father held her against her will for two weeks, during which time he beat and assaulted her. She described her ordeal as follows: “The next day, afraid of what [Father] may do, I left on the first bus out of Durbin for Johannesburg w[h]ere he was waiting for me at the bus station (without the baby) when I arrived. He took me to his friend's house in Bedfordview where he had the baby. [Father] did not turn over the baby to me as I had hoped and anticipated. Instead, he kept me hostage and held me captive for two weeks where he repeatedly beat and assaulted me. I had no way of contacting anyone during this time. Finally, after two weeks of torture, [Father] decided that we should all leave together threatening to shoot me and the baby if I did not obey him. We returned by air from Johannesburg to Durbin. When we arrived at the Durbin airport, he released me but once again refused to let the baby go.”

*2 Tyron remained in Father's custody in violation of the Supreme Court's custody order. According to Mother, the Verulam police again failed to help obtain Tyron's return. Through Mother's attorney's efforts, the kidnapping case was transferred to the Tongaat Police station, but that “investigation proceeded endlessly without arrest or prosecution.”

While he continued to withhold Tyron from Mother, Father filed a false child neglect report against Mother with the Verulam Child and Family Welfare Society (“Society”). The Society opened an investigation and obtained an order on July 11, 1996, from a Children's Court Commissioner of Child Welfare detaining

Tyron in Father's protective care.

According to Mother, on November 20, 1996, while Tyron was detained in Father's protective care, Father kidnapped Mother at gunpoint and held her at his mother's house in Verulam, where he and Tyron were staying. Mother's brother, who witnessed the abduction, reported the crime to the Verulam police. The Verulam police went to the grandmother's house twice to investigate, but twice left without seeing Mother after being told "that all was in order." Finally, the police returned to the grandmother's house accompanied by Mother's brother, "who insisted on speaking to [Mother] directly. Sgt. Daniel Govender came in and was shocked at how badly swollen my face was from [Father's] beatings and said to [Father] that he had instructions from the station commander to take me back to the police station. When I arrived at the police station, [Father's] sister took me aside and pleaded with me not to open a charge against her brother. But, I did. I also opened a charge against her for obstructing the ends of justice. All these cases were forwarded to the Tongaat Police station. Yet again, nothing has ever come of them and they are still pending for all I know. Still, Tyron remained with his father as the police refused to remove the child from [Father] claiming to act on a Children's Welfare Order that the child is to remain in his care pending investigation. My child was not returned to my custody despite my efforts and the efforts of my lawyer until June 27, 1997."

On November 1, 1996, Mother moved to Westville, a short distance from her former home in Overport. On November 28, 1996, Mother married her present husband, Ivan W. Mother and Ivan W. lived at the Westville address until November 1997, when they moved a few miles to Morningside. Mother contends she gave Father her new addresses, but Father denies this.

After completing its investigation of Father's false child neglect report, the Society filed a Social Worker's Report that vindicated Mother. The report stated that although Father's relatives "felt that [Mother] was irresponsible and unfit to" care for Tyron, Father's relatives had "alienated themselves from" Mother due to "their anger over her marriage to a relative. This has been facilitated by [Father's] contact with them, and his own agenda to tarnish [Mother's] image so as to gain access/custody of" Tyron. The social worker received reports that Mother "took

good care of the child."The report found, however, "that [Father] has led an unstable lifestyle, and continues to do so though to a lesser degree [¶] (1) he has associated with persons of disrepute. [¶] (2) consumes liquor, and becomes intoxicated. [¶] (3) been involved in altercations with various persons. [¶] (4) he is aggressive in speech and behavior. [¶] (5) has been violent and abuse to [illegible] married, and thereafter. [¶] (6) has not shown responsibility to his family. [¶] (7) has not been in stable employment."

*3 The report explicitly found Father to be "unfit to have the child concerned in his care."The report found "it would be in the child's interest to be restored to the care of his mother.... She is in a stable marriage, and is able to care for the child concerned...." The report stated the Society would provide Father with "reconstruction services" and would monitor any visits with Tyron "if and when he is in [Father's] care."

At the June 27, 1997, Children's Court hearing, the judge adopted the report's findings. The judge admonished Father for having badly used the Children's Court in an improper attempt to overturn the Supreme Court's custody order. The Children's Court returned Tyron to Mother's sole custody after making findings consistent with the report's determination that Father was violent, dangerous, and an unfit parent. The court ordered Father to surrender his firearm to the police and warned him that he "should be charged under the Intimidation Act."The court stated it was "disturbed in that it feels that it is being used by you young man badly after you having taken this child away from the mother, to then come to this Court and then attempt to have custody of the child instead of going back to the Supreme Court, who originally made the first order. [¶] What is of more disturbing to this Court is to find that you do it in such a violent way.... [T]his Court, ..., and the officers of the Court, have the highest respect for Mrs. Morar [of the Society]. [¶] I, in fact, have had personal dealings with [Mrs. Morar] since 1981, and I do not doubt any word that this lady will say, and it shocks me to find that you had the audacity to try and convince the Court that the lady would lie, or that the lady would even deliberately do anything because she dislikes you. [¶] This does not go down very easily with the Court. This in fact tells against you despite all the efforts of your attorney to assist you there. [¶] The Court finds that this child is in need of care and

Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2002 WL 31586632 (Cal.App. 2 Dist.))

must be returned to the mother in terms of the Order of the Supreme Court. [¶] You have your rights. You have an attorney now. You must consult your attorney and you must abide by what he says. You must not play God, Mr. M[.] There is only one God, and it is not you. You will abide by what the Courts say, and the Courts will be guided by social workers, understand?"^{FN2}

^{FN2}. Although Father has filed declarations in this proceeding denying the abuse, this is not the proper forum in which to challenge the South African court's findings, which we accept as final.

Although the June 27, 1997, Children's Court order did not mention Father's visitation rights, the Social Worker's report (which the court indicated it would follow) recommended that visitation, if and when it occurred, must be monitored. Father, however, never exercised his visitation rights after the June 27 hearing. Father contends this was because he did not know Mother's address. Mother, however, states he must have known her address because his attorney had come to her home after the hearing "to pressure me to allow liberal contact between [Father] and the child despite the Children's Court order." Father, however, claims he had to hire a private investigator to find her address, but Mother had moved each time before he could contact her.

*4 On November 10, 1998, Mother moved with her husband and Tyron to America. Mother concedes she "did not inform [Father] of my departure." It is undisputed that Father neither consented to Tyron's departure from South Africa nor signed Tyron's passport application.

Father contends that under South African law, despite his non-custodial parent status, he retained a statutory right of guardianship that required, in the absence of a court order, both parents to consent for Tyron, while a minor, to marry, be adopted, leave the country, apply for a passport, or alienate or encumber any immovable property or any right to immovable property. (South Africa Guardianship Act 192 of 1993.)

According to Father's declaration, he suspected in the late fall of 1998 that Mother had moved to America with Tyron. At that time, Father phoned Mother's parents' residence in Los Angeles and recognized

Mother's voice, but she hung up on him. Thereafter, Father "contacted Barbara Hechter[, the Chief Family Advocate] of the South African Central Authority[, and] asked her to initiate legal proceedings for the return of my son..."^{FN3} In May 1999, Hechter forwarded Father's Hague Convention application for Tyron's return to the United States National Center for Missing and Exploited Children. In July 2000, the District Attorney of Los Angeles County filed Father's Hague Convention application with the United States Department of State.

^{FN3}. According to her declaration, Barbara Hechter "was the Chief Family Advocate for the South African Central Authority" in May 1999.

On September 13, 2000, Father filed the present petition in superior court seeking an order to compel Tyron's return to South Africa, alleging Tyron had been wrongfully removed in violation of Father's right of custody under the Hague Convention. The petition alleged each of the prerequisites for return had been met: (1) Father had a right of custody at the time of removal; (2) Father was exercising his right of custody at the time of removal; (3) Tyron was a habitual resident of South Africa at the time of removal; and (4) Father had filed the Hague petition within a year of the wrongful removal. Father contended that despite his non-custodial parent status, his statutory right to object to Tyron's removal from the country constituted a "right of custody" for purposes of the Hague Convention.

In opposition to the petition, Mother contended that Father, as a non-custodial parent, had no right and was exercising no right of custody at the time of Tyron's removal. Mother alleged that a non-custodial parent's guardianship right to object to a child's removal does not constitute a "right of custody" that would trigger the remedy of automatic return under the Hague Convention. In addition, Mother argued the removal was not wrongful because the Children's Court had suspended Father of his guardianship right to object to Tyron's removal by virtue of its June 27, 1997, order naming Mother as Tyron's sole custodial parent and *sole guardian*.^{FN4}

^{FN4}. Mother's opposing papers below stated in part: "THE ORDER OF A CHILDREN'S COURT: REGULATION 11 is a preprinted

order which provides several alternatives within each paragraph which may be circled or crossed-out as the case requires. The Order at issue here has a series of hand written interlineations, signed by P.P. Weber, the Commissioner of Child Welfare. This form contains references to 'guardian' in two separate places (line 5 after the place for 'full name and address' and on line 2 of subparagraph (a) of the Order itself. Each reference is preceded by an (asterisk)). The reference to which the asterisk refers appears at the bottom of the form and states ' *Delete whichever is not applicable.' There is no deletion in either place."

In reply, Father submitted the declaration of Barbara Hechter, who disagreed that the June 27 order had suspended Father's implied statutory guardianship rights. The June 27 Children's Court order, according to Hechter, could not have overturned the Supreme Court divorce decree which, by its silence with regard to Father's guardianship rights, had implicitly left intact Father's statutory guardianship rights. According to Hechter, the Children's Court lacked jurisdiction to suspend Father's statutory guardianship rights. Hechter stated that the June 27 order "required the return of physical custody of the minor child to [Mother]. This Order, however, did not and could not 'overturn' the Divorce Decree of the Supreme Court of South Africa. Only the Supreme Court has jurisdiction to amend an order about custody, control and access to a child pursuant to the 'Amendment of Court Orders of Children', Rule 13.2.... Therefore, [Father] retained his joint guardianship rights." Hechter further stated that under South African law, the June 27, 1997, order necessarily expired two years after it was entered. (Tyron, however, left the country *before* the two-year period had elapsed.)

*5 Father also submitted a supplemental declaration denying that he had physically abused Mother.

On October 31, 2000, the superior court continued the hearing on Father's petition for six months "to permit the parties to pursue any remedies they might have within the jurisdiction of South Africa."

The record shows that Father attempted to instigate two criminal child abduction proceedings against Mother in South Africa. Mother stated in her declara-

tion: "I have since learned that both actions have been dismissed as unmeritorious. The first claim was dismissed on February 27, 2000 pursuant to a written statement of the Manager for the Missing Persons Bureau, stating that the child and the mother are currently residing in the United States of America, that the child is legally in the custody of his mother, and that the mother and the child should be left alone to continue with their lives without being harassed all the time. A true and correct copy of that letter is attached hereto as **Exhibit 4** and incorporated herein by reference. The second effort, which I believe [Father] commenced in or about August, 2000 was finalized and closed on September 12, 2000. A copy of a letter from P. Harrilal, the Unit Commander, Child Protection Unit, declining to prosecute the case and closing it is attached hereto as **Exhibit 5** and incorporated herein by reference."

Exhibit 4, dated February 27, 2002, is a bulletin issued by Captain S.J. van Deventer, Manager of the South African Police Service Bureau for Missing Persons. The bulletin states that Tyron is not a missing person and, "[a]s far as can be ascertained the child and his mother SANDRA W[.] [are] currently residing in the United States of America. The court records in South Africa also show[] that the child is legally in the custody of his mother. [¶] ... Attached please find a copy of the final divorce agreement where custody of the child is given to the plaintiff (Sandra) Par. 2.[¶] ... I also include a copy of an order of a Children's Court dated 27 June 1997 w[h]ere it was ordered again that the child must be restored into the custody of [Mother], plus the findings of the said Court. [¶] ... I hope that these documents will clarify the situation and that the said individuals will be left alone to continue with their lives without being harassed all the time."

Exhibit 5, dated September 29, 2000, is a bulletin issued by Captain P. Harrilal, Unit Commander of the Durban Police Child Protection Unit. The bulletin states that Father's abduction complaint was rejected by "the Senior Public Prosecutor who declined to prosecute on 2000-09-12.[¶] ... The matter is considered finalized by this office."

On November 5, 2001, the superior court rejected Father's Hague petition. The superior court concluded Father's guardianship right to object to Tyron's removal from South Africa does not constitute a right

of custody under the Hague Convention. The superior court also found that Mother's removal of Tyron "was not wrongful in that it was acknowledged that [Mother] had sole custody of the minor child."

*6 After the petition was denied, Father requested a statement of decision under [Code of Civil Procedure section 632](#). The court denied the request, finding the statute to be inapplicable to motion hearings. The court stated it "did not make a child custody decision, but rather ruled on whether this court had jurisdiction to make such a decision."

On appeal, Father challenges the superior court's legal finding that his guardianship right to object to Tyron's removal from South Africa does not constitute a custody right under the Hague Convention. Father also challenges the superior court's refusal of his request for a statement of decision.

DISCUSSION

[1] The Hague Convention, to which the United States and South Africa are both signatories, was adopted in an effort "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." ([Hague Convention, Preamble, 51 Fed.Reg. at 10,498](#)). "The Convention rests on the principle that a child's country of 'habitual residence' is best placed to decide upon questions of custody and access. [Citation.]" ([Croll v. Croll \(2d Cir.2000\) 229 F.3d 133, 137](#), fn. omitted.)

A. *The Right of Custody v. the Right of Access*

In this case, the South African Supreme Court granted Mother *sole* custody of Tyron, and granted Father a right of access (visitation on alternate weekends). The South African Children's Court, however, after finding Father to be a violent and unfit parent, indicated it would follow the Society's recommendation of monitored visitation.

The Hague Convention provides a remedy of return where the child is wrongfully removed in breach of the petitioner's right of *custody* (as opposed to a right of access), provided the petitioner was actually exer-

cising (or would have been exercising) the right of custody at the time of removal. The remedy of return is not available under the Hague Convention for a removal that is merely in breach of the petitioner's right of *access* to the child.

A removal is only wrongful under the Hague Convention if it was in breach of a right of custody. A removal in breach solely of a right of access is not wrongful under the Hague Convention. One purpose of the Hague Convention is to deter parents from forum shopping abroad for more favorable custody rulings: "In order to 'preserve the status quo and to deter parents from crossing international boundaries' to secure a more favorable forum for the adjudication of custody rights, [Blondin v. Dubois, 189 F.3d 240, 246 \(2d Cir.1999\)](#) (internal quotation marks omitted), the Convention provides for the return of children 'wrongfully removed to or retained in any Contracting State.' [Hague Convention, art. 1, 51 Fed.Reg. at 10,498](#). A removal or retention is to be considered 'wrongful' where: [¶] 'a) it is in breach of *rights of custody* attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident and immediately before the removal or retention; and [¶] 'b) at the time of removal or retention those rights were *actually exercised*, either jointly or alone, or would have been so exercised but for the removal or retention.' [¶] *Id.* art. 3, [51 Fed.Reg. at 10,498](#) (emphasis added). Rights of custody 'may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'*Id.*" ([Croll v. Croll, supra, 229 F.3d at p. 137.](#))

*7 Rights of custody are defined under the Convention as " 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.'*Id.* art. 5, [51 Fed.Reg. at 10,498](#). [¶] Rights of custody are distinguished from *rights of access*, which are defined in the Convention as 'the right to take a child for a limited period of time to a place other than the child's habitual residence.'*Id.* The Convention provides recourse in the event a child is removed from an habitual residence in breach of access rights, but those remedies *do not* include an order of return to the place of habitual residence. *See id.* art. 21, [51 Fed.Reg. at 10,500](#). To vindicate the breach of access rights, the Convention authorizes signatory nations to use one or more re-

medies (short of return) to ‘promote the peaceful enjoyment of access rights,’ and to ‘take steps to remove, as far as possible, all obstacles to the exercise of such rights.’ *Id.* One such remedy is a writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the non-custodial parent with access rights. *See id.* art. 26, [51 Fed.Reg. at 10,500, *Viragh v. Foldes*, 415 Mass. 96, 612 N.E.2d 241, 246-50 \(1993\)](#) (ordering a custodial parent who brought a child to the United States in frustration of a Hungarian access decree to pay the travel costs of visitation). The Convention makes plain that unless the petitioner has rights of custody, a court has no authority to order return.” ([Croll v. Croll, supra, 229 F.3d at pp. 137-138.](#))

B. Father's Burden of Proving a Removal in Violation of Custody Rights

“In the United States, a petitioner claiming wrongful removal under the Convention may bring a petition for an order of return in a United States district court or in a court of any state. *See* [42 U.S.C. 11603\(a\), \(b\)](#). The court has the authority only to determine whether the child's removal was ‘wrongful’ within the meaning of the Convention, *i.e.*, whether the removal ‘was in breach of custody rights’ held by the petitioner. *See id.* [§ 11603\(e\)\(1\)\(A\)](#). The petitioner bears the burden of proving ‘wrongful removal’ by a preponderance of the evidence. *See id.* [§ 11603\(e\)\(1\)](#). If the petitioner shows that the child was wrongfully removed, the court must order the child's return to the country of habitual residence unless the respondent demonstrates that one of four narrow exceptions apply. *See id.* [§ 11601\(a\)\(4\)](#); [Blondin, 189 F.3d at 245-46](#) (discussing enumerated exceptions). The court is not permitted to consider the merits of underlying custody disputes. *See id.* [§ 11601\(b\)\(4\)](#).” ([Croll v. Croll, supra, 229 F.3d at p. 138.](#))

Accordingly, in this case Father had the burden of proving, by a preponderance of the evidence, that Tyron was wrongfully removed in breach of Father's custody rights.

C. Father Failed to Establish a Violation of His Custody Rights

*8 In this case, the South African Supreme Court granted Mother *sole* custody of Tyron. Given Father's

inability to rely upon a court order to establish his right of custody, Father argued below that his statutory right to object to Tyron's removal (under the South African Guardianship Act 192 of 1992) constituted a custody right under the Hague Convention.

The South African Guardianship Act 192 of 1993 states that a guardian has the right to object to, among other things, a child's removal from the country of habitual residence. Custody decrees or agreements sometimes contain similar language, called a *ne exeat* clause, stipulating that both parents must consent to the child's removal from the country. In this case, the parties' divorce order did not contain a *ne exeat* clause. Father contends that under South African law, the Supreme Court's failure to mention the right of guardianship in his divorce order means he retained his right to object to Tyron's removal under the Guardianship Act.

Assuming that Father possessed guardianship rights when the divorce order was entered, we turn to Mother's response that Father's guardianship rights were suspended by the Children's Court order naming her as Tyron's sole custodial parent and *sole guardian*. Mother argued below that the Children's Court, by failing to strike the word “guardian” from the pre-printed order, had *granted* Mother temporary sole custody and guardianship over Tyron.

In reply, Father did not dispute the import of the Children's Court's failure to strike the word “guardian” from the order, but rather attacked that court's *jurisdiction* to rule on the matter. According to Hechter's declaration, the June 27 Children's Court order “did not and could not ‘overturn’ the Divorce Decree of the Supreme Court of South Africa. Only the Supreme Court has jurisdiction to amend an order about custody, control and access to a child pursuant to the ‘Amendment of Court Orders of Children’, Rule 13.2.... Therefore, [Father] retained his joint guardianship rights.”

Hechter's declaration, however, does not carry the force of law. Other than Hechter's declaration, Father has provided no legal authority to support his position that the June 27 Children's Court order suspending his right of guardianship is void for lack of jurisdiction. As far as we are aware, he has not obtained a reversal of that order on direct appeal, nor has he filed a collateral action attacking the order. On the

contrary, apart from Hechter's declaration, every indication in the record weighs *against* Father's claim that the June 27 Children's Court order is invalid.

The record shows, without contradiction, that South African authorities have twice rejected Father's efforts to have Mother prosecuted for removing Tyron in violation of Father's access and guardianship rights. The South African police have declined to proceed with Father's child abduction allegations against Mother. Captain van Deventer, Manager of the South African Police Service Bureau for Missing Persons, explicitly stated in Exhibit 4 that the final divorce order *and* the June 27 Children's Court order and findings supported the dismissal of Father's child abduction allegations. In addition, according to exhibit 5, the Senior Public Prosecutor has refused to prosecute Mother for child abduction.

*9 In these proceedings, the superior court even granted Father a six-month stay (which stretched to a year) to pursue any available remedies in South Africa. At the end of that one-year period, Father produced no new evidence to support his claim that the removal was wrongful or in breach of his rights of custody under South African law. Given the absence of such evidence, we conclude the superior court properly determined, based on the court orders, exhibits, and declarations contained in the record, that Tyron was not removed in violation of Father's custodial rights. Even assuming that guardianship rights are the equivalent of custodial rights for Hague Convention purposes, substantial evidence supports the finding that Father had no guardianship or custodial rights when Tyrone was removed to this country.

D. *No Remedy of Return for Violation of the Right of Access*

Given that Tyron's removal was not wrongful because it did not violate Father's custodial rights, we conclude the superior court properly refused to order Tyron's return to South Africa. "The Convention makes plain that unless the petitioner has rights of custody, a court has no authority to order return." ([Croll v. Croll, supra, 229 F.3d at p. 138.](#))

E. *The Croll Decision*

Father contends the superior court erroneously relied upon the *Croll* decision in denying his petition. In

[Croll v. Croll, supra, 229 F.3d 133](#), the court rejected the notion that a child's removal in violation of a *ne exeat* clause constituted a violation of the non-custodial parent's custody rights. *Croll* held that a *ne exeat* clause does not confer custodial rights upon a non-custodial parent. *Croll* held "that rights of access do not constitute rights of custody within the meaning of the Hague Convention, even when coupled with a *ne exeat* clause." (*Id.* at p. 135.)

Father contends *Croll* was wrongly decided and represents a minority view because many other jurisdictions have reached a different conclusion. We need not decide whether we agree or disagree with *Croll*, however, because in this case, Father's guardianship rights were suspended by the June 27 Children's Court order granting Mother sole custody and guardianship of Tyron. Even if we were to disagree with *Croll's* holding, it would make no difference here because in this case, there was no *ne exeat* clause in effect at the time of Tyron's removal. Accordingly, we express no opinion regarding whether Father's guardianship rights, had they not been suspended, constituted rights of custody within the meaning of the Hague Convention.^{FNS}

^{FNS} The California Attorney General has filed an amicus brief expressing his disagreement with the *Croll* decision. The amicus brief states in part, "Insofar as the trial court adopted the mechanical analysis in *Croll* rather than the more expansive understanding of the phrase 'rights of custody' as contemplated by the Hague Convention, the trial court erred."

The Crolls were married in Hong Kong, where they had a daughter in 1990. The Crolls were divorced in Hong Kong in 1998. The Hong Kong court awarded the mother sole custody and granted the father a right of reasonable access. The custody order contained a *ne exeat* clause prohibiting the child's removal, while a minor, from Hong Kong without either the father's consent or leave of court.

The mother in *Croll* violated the *ne exeat* clause by bringing the daughter to America without leave of court or the father's consent. The mother instituted child cus-

tody proceedings in a New York state court. The father filed a Hague Convention petition in the Southern District of New York, seeking the daughter's return to Hong Kong.

The district court in *Croll* held that the *ne exeat* clause gave the father a right of custody within the meaning of the Hague Convention, and ordered the child's immediate return to Hong Kong. The circuit court reversed, however, finding the *ne exeat* clause did not create a right of custody within the meaning of the Convention. The father, the circuit court held, possessed only a right of access and not a right of custody, notwithstanding the veto power created by the *ne exeat* clause. (*Croll v. Croll, supra*, 229 F.3d at pp. 138-144.)The court stated in part: “[A] *ne exeat* clause does not transmute access rights into rights of custody under the Convention. *Ne exeat* or not, Mr. Croll's rights include none of the powers (or burdens) of a custodial parent, and therefore are properly classified as rights of access. The Convention affords him several remedies for trespass on those rights, but return of the child to Hong Kong is not one of them.” (*Id.* at pp. 143-144.)

Other courts, however, have reached a contrary conclusion and there is no consensus available. (See cases cited in *Croll v. Croll, supra*, 229 F.3d at p. 143.)As noted in *Croll*,“Although the dissent claims ‘strong support’ in caselaw for its point of view, ... the dissent itself confirms that no consensus is available: the cases worldwide are few, scattered, conflicting, and sometimes conclusory and unreasoned.”(*Ibid.*)“The lack of uniform interpretation (or application) of the Convention can be illustrated another way. The rate of return for children wrongfully removed to the United States from other countries is approximately 90 percent. See Mary A. Ryan, Assistant Sec. for Consular Affairs, U.S. Dep’t of State, Prepared Statement Before the House Committee of International Relations (Oct. 14, 1999)

[available in 1999 WL 9009860 \(F.D.C.H.\)](#) at 3. The rate of return for American children wrongfully removed from the United States to a foreign country, however, is less than 30 percent. See Thomas A. Johnson, Prepared Statement Before the House Committee on International Relations (Oct. 14, 1999) [available in 1999 WL 909869 \(F.D.H.C.\)](#) at 30.“ (*Ibid.*)

F. Statement of Decision

[2] Father requested a formal statement of decision under [Code of Civil Procedure section 632](#). The superior court invited briefing on the matter. Father contended in his papers below that judicially created exceptions exist to the traditional rule that a statement of decision is not required after a ruling on a motion. Citing [In re Marriage of Baltins \(1989\) 212 Cal.App.3d 66, 80, 260 Cal.Rptr. 403](#), and [In re Marriage of S. \(1985\) 171 Cal.App.3d 738, 747, 217 Cal.Rptr. 561](#), Father contended the exception exists in child custody matters, due to their exceptional importance. Father requested findings on three specific issues: (1) whether Father's right of guardianship to object to Tyron's removal constituted a right of custody under the Hague Convention; (2) whether Father was exercising his right of custody at the time of removal; and (3) whether the removal was wrongful.

*10 The superior court refused to apply the exception here, finding that it had made no custody rulings that would require the issuance of a statement of decision.

The superior court was correct. Its authority under the Convention was simply to determine whether a wrongful removal had occurred in breach of Father's custody rights. (*Croll v. Croll, supra*, 229 F.3d at pp. 137-138.)The superior court, by finding that no wrongful removal had occurred, did not change or modify any existing custody order. Accordingly, no statement of decision was required in this case.

Father contends that even if a statement of decision was not required, the court retained the discretion to issue one. Here, however, it is impossible to find the denial of a formal statement of decision constituted an abuse of discretion. The superior court's ruling was plainly and fully stated in its minute order of November 5, 2001, which incorporated by reference

the “findings and order as more fully reflected in the notes of the Court Reporter[.]” There were no disputed material facts.

(Cal.App. 2 Dist.)

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G. Other Issues

Mother contends, and the Attorney General agrees, that if we reverse the superior court's ruling, we should remand for further proceedings (in the first instance) on whether return is inappropriate due to other circumstances.^{FN6} Father contends such a remand would be prejudicial because of the delay that would be required. In light of our resolution of this case, we do not reach this issue.

[FN6.](#) Under Article 12 of the Convention, for example, if the proceedings are commenced more than one year after the child's removal, the child need not be removed if the child is now settled in the new environment. In this case, the petition was filed more than one year after Tyron's removal. Father contends the proceeding was nonetheless initiated within a year after removal because his application was forwarded to the United States authorities within a year of removal.

In addition, Article 13 of the Convention provides an exception to the return requirement where it is established that the return will place the minor child at grave risk of physical harm or in an intolerable situation. Mother contends another exception exists under Article 13 where the minor is so deeply rooted in the new country that the return would be psychologically or emotionally damaging.

DISPOSITION

We affirm the order denying Father's petition for Tyron's return to South Africa under the Hague Convention. Mother is awarded her costs.

We concur: [SPENCER](#), P.J., and [VOGEL \(Miriam A.\)](#), J.
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